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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 CHARLES WIRTH,  
8 Petitioner,  
9 v.  
10 ROBERT LEGRAND, et al.,  
11 Respondents.

Case No. 2:17-cv-00027-RFB-VCF

ORDER

12 *Pro se* petitioner Charles Wirth has filed several motions in his 28 U.S.C. § 2254  
13 habeas matter. In most of the motions, Wirth mainly challenges the court's order  
14 granting respondents' motion for leave to file a supplement to their motion to dismiss  
15 and/or to withdraw the motion. He has also filed a motion for leave to conduct discovery  
16 (ECF No. 40). Respondents opposed (ECF No. 41), and Wirth replied (ECF No. 42).

17 **I. Motions Related to Respondents' Motion to Dismiss**

18 On March 23, 2018, the court permitted respondents to withdraw their motion to  
19 dismiss without prejudice (ECF No. 29). Respondents had explained that, apparently  
20 due to a docketing error, they did not review all grounds that Wirth raised, and therefore,  
21 their motion to dismiss may have been incomplete (ECF No. 27). In the interests of  
22 clarity, efficiency, and justice, and because Wirth was not prejudiced, the court granted  
23 respondents' motion. While Wirth filed motions challenging the court's order, he has  
24 also now filed an opposition to respondents' renewed motion to dismiss (ECF Nos. 32,  
25 34, 36). The motions challenging the grant of the motion to withdraw are denied.

26 Wirth also moves to strike respondents' reply in support of their renewed motion  
27 to dismiss. Local Rule 7-2(b) provides that a party may file a motion, the opposing party  
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1 may file a response, and the moving party may then file a reply in support of its motion.  
2 Accordingly, respondents' reply is properly before the court. Wirth's motion is denied.

## 3 **II. Motion for Leave to Conduct Discovery**

4 In Wirth's motion for leave to conduct discovery, he lists 17 documents and asks  
5 the court to order respondents to provide them, along with exhibits 151-160 in this case  
6 (ECF No. 40). Respondents point out that they have already provided Wirth with  
7 exhibits 151-160 (ECF No. 41, p. 4).

8 Rule 6 of the Rules Governing Section 2254 Cases in the United States District  
9 Courts states: "A judge may, for good cause, authorize a party to conduct discovery  
10 under the Federal Rules of Civil Procedure and may limit the extent of discovery." See  
11 also *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S.  
12 286, 300 (1969)).

13 The Ninth Circuit Court of Appeals has pointed out that "[a] habeas petitioner  
14 does not enjoy the presumptive entitlement to discovery of a traditional civil litigant."  
15 *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (citing *Bracy*, 520 U.S. at 903-  
16 05). "Rather, discovery is available only in the discretion of the court and for good  
17 cause shown...." *Id.* The court instructed:

18 Habeas is an important safeguard whose goal is to correct real and  
19 obvious wrongs. It was never meant to be a fishing expedition for habeas  
petitioners to "explore their case in search of its existence."

20 *Rich*, 187 F.3d at 1067 (quoting *Calderon v. U.S.D.C. (Nicolaus)*, 98 F.3d 1102,  
21 1106 (9<sup>th</sup> Cir. 1996)). Accordingly, a habeas petitioner will not be granted leave to  
22 conduct discovery based on allegations that are purely speculative or without any basis  
23 in the record. On the other hand, a petitioner is not necessarily required to plead  
24 specific facts entitling him to habeas relief prior to obtaining leave to conduct discovery.

25 Indeed, based on the Supreme Court's decision in *Bracy*, a petitioner may be  
26 able to establish "good cause" for discovery even though he posits only a plausible  
27 "theory" for relief. In *Bracy*, the petitioner sought discovery to support a claim that,  
28 because the judge in his case was convicted of taking of bribes from some criminal

1 defendants, he was prone to “a sort of compensatory bias against defendants who did  
2 not bribe [him].” *Bracy*, 520 U.S. at 905. Although the petitioner had not alleged facts  
3 sufficient to establish that his particular case was infected by such bias, the Supreme  
4 Court found that he was nonetheless entitled to conduct discovery based on evidence  
5 that “lend[ed] support” to an actual bias claim. *Id.* at 909. Thus, a petitioner seeking  
6 leave to conduct discovery is not required to show that the requested discovery is likely  
7 to lead to habeas relief, only that there is “reason to believe” that it “may” do so. *Id.* at  
8 908-09.

9       However, discovery in a federal habeas action does not necessarily extend to  
10 unexhausted federal claims. *Calderon v. U.S. Dist. Court for the N. Dist. of California*  
11 (“*Nicolaus*”), 98 F.3d 1102, 1106 (9th Cir. 1996). This court addressed the issue of  
12 allowing discovery in support of unexhausted habeas claims in considerable depth in  
13 *Sherman v. McDaniel*, 333 F.Supp.2d 960 (D. Nev. 2004). Based on a review of Ninth  
14 Circuit precedent, this court concluded that lack of exhaustion, while perhaps not an  
15 absolute bar to discovery, is a factor the district court should consider in exercising its  
16 discretion as to whether to allow discovery. *Id.* at 969. This court noted that “*Bracy* did  
17 not undermine the [Ninth Circuit] Court of Appeals’ concern that discovery should not  
18 proceed upon unexhausted claims,” and held:

19       This court will not grant the sort of wide-ranging discovery sought by  
20 petitioner without a showing that he has exhausted in state court, and has  
21 not procedurally defaulted, the claims on which his proposed discovery is  
22 based. To do so would tend to undermine the exhaustion requirement, and  
the doctrine of federal-state comity on which it rests.

23       *Id.* at 968-969.

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25       Moreover, in *Cullen v. Pinholster*, 563 U.S. 170, 183–84 (2011), the Supreme  
26 Court held that if a claim has been adjudicated on the merits by a state court, a federal  
27 habeas petitioner must overcome the limitations of section 2254(d)(1) based upon the  
28 record that was before that state court. To show good cause, in addition to any other

1 required showing, the petitioner must demonstrate that the documents he seeks to  
2 obtain can be considered in this federal habeas proceeding under *Cullen*. Otherwise,  
3 the parties and custodians of the discovery documents may expend considerable time  
4 and money in obtaining or producing discovery materials that will have no effect on the  
5 outcome of the case.

6 Here, Wirth was charged with two counts of sexual assault of a child under 14,  
7 attempted sexual assault of a child under 14, and four counts of lewdness with a child  
8 under 14 (exhibit 14).<sup>1</sup> He entered an *Alford* plea to open or gross lewdness; open or  
9 gross lewdness, second offense; and attempted sexual assault. Exh. 64. In his federal  
10 habeas petition, he sets forth several claims for relief based on the district court's denial  
11 of his motion to withdraw guilty plea, ineffective assistance of trial counsel for allegedly  
12 failing to investigate witnesses and the victim and for failing to fully advise him of the  
13 consequences of his guilty plea (ECF No. 11).

14 Respondents have moved to dismiss several claims as unexhausted and/or  
15 noncognizable on federal habeas review (ECF No. 35). In light of that pending motion,  
16 Wirth's motion for discovery is, at best, premature. Moreover, Wirth has not  
17 demonstrated good cause for his discovery requests. He makes general, conclusory  
18 statements that the requested discovery would reveal falsified documents, establish  
19 collateral estoppel, show that the victim was bi-polar, support his alibi, and demonstrate  
20 his actual innocence (ECF No. 40). In the last request, no. 18, Wirth seeks the juvenile  
21 records of the victim's brother, without explaining in any way how such records relate to  
22 his federal habeas claims. The court views Wirth's discovery motion as nothing more  
23 than a fishing expedition. Accordingly, the motion for leave to conduct discovery (ECF  
24 No. 40) is denied.

### 25 **III. Conclusion**

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28 <sup>1</sup> Exhibits referenced in this order are exhibits to respondents' first motion to dismiss, ECF No. 17, and are found at ECF Nos. 18-24.

1           **IT IS THEREFORE ORDERED** that the following motions filed by petitioner:  
2 emergency motion to strike (ECF No. 32); motion for reconsideration (ECF No. 34); and  
3 motion to strike reply (ECF No. 38) are all **DENIED** as set forth in this order.

4           **IT IS FURTHER ORDERED** that petitioner's motion for copy of the petition (ECF  
5 No. 33) is **GRANTED**. The Clerk **SHALL SEND** to petitioner one copy of the petition at  
6 ECF Nos. 11, 11-1, 11-2.

7           **IT IS FURTHER ORDERED** that petitioner's motion for leave to conduct  
8 discovery (ECF No. 40) is **DENIED**.

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11           DATED: 29th day of August, 2018.

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15           RICHARD F. BOULWARE, II  
16           UNITED STATES DISTRICT JUDGE  
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